Dan Siegel's
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Victory Newsletter
A weekly summary of newly filed, defense-favorable, published federal decisions
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CA4 holds that arson offense at 18 U.S.C. § 844(f) is not a 924(c) "crime of violence." U.S. v. Cecil McDonald Davis, 2022 WL 16845133, No. 16-7671, CA4, Nov. 10, 2022. "Because the version of § 844(f) that [D] was convicted under criminalized the arson of property fully owned by the defendant, and not just that of the property 'of another' as required by § 924(c), it is not categorically a crime of violence." Op. at *4.

DC holds that D's assertion of *Miranda* rights was effective where: (1) D told agents that he would "tell them the whole story," (2) agents secured a written waiver of *Miranda* rights, but then (3) speaking over the interrogator's voice, D expressed the desire for an attorney. U.S. v. David Worster, 2022 WL 2177142, No. 21-CR-111, D. Rhode Island, McConnell, J., June 16, 2022. Government argued that D's invocation of the right to counsel was "ambiguous" because D asked for an attorney while the interrogator was speaking, making it impossible for the interrogator to hear D's request. DC rejects government's argument. "Whether the right to counsel has been invoked is an 'objective inquiry.' This Court listened to the recording of the custodial interrogation of [defendant]. [The interrogating agent] was in the front seat [of the police vehicle], turned around[,] and was looking straight at [defendant] when [D] said, 'I want my lawyer.' The Court finds that a reasonable person would have heard the unequivocal and unambiguous invocation of the right to counsel by [defendant]." Op. at *5, cite omitted. DC suppresses statements given after assertion of the right to counsel.

When DC directs State to file an Answer to a 2254 petition, DC does not have authority to excuse State's failure to attach copies of the documents identified in Rule 5 of the "Rules Governing Section 2254 Cases." Arthur Lee Sanford v. Harold W. Clarke, 2022 WL 16643886, No. 20-6712, CA4, Nov. 3, 2022.

CA7 remands for re-sentencing in meth case where: (1) D objected to PSR's calculation of 100% meth purity; (2) in support of objection, D submitted affidavit, by defense chemist, calling into question reliability of DEA report upon which purity finding was based; and (3) DC *should* have found the defense affidavit sufficient to trigger gov burden of proving the "100% purity" allegation. U.S. v. Antwain Moore, 2022 WL 16736302, No. 21-2485, CA7, Nov. 7, 2022. Where PSR advances a drug quantity "fact" that has the effect of raising D's guideline range, gov has burden of proving that fact by a preponderance of the evidence – *if* D adequately preserves an objection. CA7 case law recognizes alternate standards for assessing the adequacy of D's objection to a fact alleged in the PSR. Where drug quantity finding is based on allegations by "confidential informants of unknown reliability," D's "bare denial" of those allegations is sufficient to require gov to prove, by a preponderance of the evidence, that the informants' allegations are reliable. Op. at *1, n. 1. By contrast, if the P.O.'s drug quantity calculation is based on a DEA lab report, the defendant must, in addition to making an objection, offer "some evidence" calling into question the reliability of the DEA report. Op. at *3. In the instant case, CA7 holds that by submitting the affidavit of the defense chemist, D met this "some evidence" standard – and that the government was therefore required to prove, at sentencing, that the DEA test results were reliable. "On remand, the district court may not rely on the [DEA] test results without requiring the government to furnish affirmative support for their reliability and allowing [D] to challenge that evidence." Op. at *4.

DC suppresses guns and drugs found during warrantless search of D's car, where gov failed to prove that search was justified under "plain view" doctrine, or that anonymous tip provided probable cause to search under the "collective knowledge" doctrine. U.S. v. Michael S. Jackson, 2022 WL 16860516, No. 22-CR-53, E.D. Virginia, Wright Allen, J., Nov. 1, 2022. Police received detailed but anonymous tip that D was driving a particular car, and that he had drugs/guns in the car. After determining that driver had open warrants, police stopped his car, arrested D on the open warrants, and then found guns and drugs inside the car. D moved to suppress on ground that drugs/guns were fruit of warrantless search conducted without probable cause. **Plain view doctrine** – in opposing suppression, gov argued that drugs/guns inside the car were within "plain view" of officers standing outside the car, and that police were therefore justified in conducting a warrantless search. At suppression hearing, gov established that an officer standing outside the car would have been in a position to see the guns and drugs inside the car. However, testimony at the suppression hearing called into question whether the officer who entered the car did in fact see guns/drugs before entering the vehicle. For this reason, DC held that the "plain view" doctrine was inapplicable. "Under the plain view doctrine, the Government must demonstrate that the officer conducting the search actually saw the contraband prior to initiating his search. The fact that an officer 'could have seen' the evidence he unlawfully recovered from a lawful vantage point is not sufficient." Op. at *8, cite omitted. **Collective knowledge doctrine** – information given to the 911 operator would have provided probable cause to search the car, *if* the totality of that information had been shared with the officers who searched the car – but it wasn't. "Under the collective knowledge doctrine, information known to the 911 operator but not relayed to the police cannot contribute to the probable cause analysis." Op. *10, cite omitted.

DC issues writ of habeas corpus, conditioned on grant of a new trial, where state prisoner received death sentence for murder of prison guard; DC finds "pervasive prosecutorial misconduct" arising from failure to make *Brady-Giglio* disclosures regarding the State's prisoner-witnesses. Larry Roberts v. Ron Broomfield, Warden, 2022 WL 16532819, No. 93-CV-254, E.D. Calif., Drozd, J., Oct. 28, 2022. Among the omissions identified by the DC as acts of prosecutorial misconduct: (1) Prosecutor failed to disclose that their key prisoner-witness had previously been declared insane; this information was in the witness's prison records, prosecutor had access to those records, and prosecutor is charged with constructive knowledge of the information. Op. at *17, cite omitted. (2) Prosecutor represented to the jury that State's key prisoner-witness was testifying because his religious faith motivated him to "do the right thing;" prosecutor didn't disclose that the witness sought help in getting married and having conjugal visits with his wife-to-be; this "witness motivation" evidence was material and should have been disclosed. Op. at *21, cites omitted. (3) Prosecutor knew that one of his witnesses was lying when he denied that he and other prisoner-witnesses had met to discuss the case; prosecutor failed in his duty to correct the false testimony. Op. *24, cite omitted.

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